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No. 16-240

In the Supreme Court of the United States

KENTEL MYRONE WEAVER,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF FOR THE RESPONDENT

MAURA HEALEY
Attorney General of Massachusetts
ELIZABETH N. DEWAR
State Solicitor
RANDALL E. RAVITZ*
THOMAS E. BOCIAN
Assistant Attorneys General
JOHN P. ZANINI
Special Assistant Attorney General
One Ashburton Place
Boston, MA 02108
(617) 963-2852
Randall.Ravitz@State.MA.US
**Counsel of Record*

QUESTION PRESENTED

Whether a defendant who claims that his counsel was ineffective for failing to object to a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel's deficiency in order to obtain a new trial under *Strickland v. Washington*, 466 U.S. 668 (1984).

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CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

INTRODUCTION

The jurors at Petitioner's Massachusetts trial for murdering a fifteen-year-old boy were selected in a packed courtroom. While Petitioner's mother and her pastor unfortunately could not enter, the courtroom was filled with dozens of members of the public in the form of prospective jurors. As the defense did not object, the trial judge was never made aware of the spectators' exclusion. He was thus unable to address the potential error at a point when it could have been remedied without causing disruption or substantially burdening any party. Petitioner advanced a post-trial claim that his counsel's failure to object was so serious as to deprive him of his Sixth Amendment right to the effective assistance of counsel. But no such deprivation occurred unless his counsel's error prejudiced the defense in the sense that it was reasonably likely to

have affected his trial's result. And, as Petitioner's situation was not comparable to a complete denial of counsel, he was required to affirmatively show that effect. Yet instead of attempting to do so at his evidentiary hearing or on appeal, he has rested on an argument that he should be relieved of showing prejudice. That argument disregards established Sixth Amendment principles, relying instead on the "structural error" rule applied in a wholly different context. Adopting Petitioner's sweeping rule would result in effective-counsel violations being found where there are none, would disserve important purposes underlying the prejudice requirement, and would incentivize defendants to forego raising timely objections. Such a presumption of prejudice, untethered to the core principles underlying the right to effective assistance of counsel, is also not needed to ensure fairness. Indeed, in Petitioner's own case, such a presumption would be unjust, as any prejudice from his counsel's failure to object to the exclusion of spectators from jury selection was highly improbable. The judgment should be affirmed.

STATEMENT

Following a jury trial in a Massachusetts court, Petitioner was convicted of first-degree murder by deliberate premeditation, in violation of Mass. Gen. Laws ch. 265, § 1, and unlicensed possession of a firearm, in violation of Mass. Gen. Laws ch. 269, § 10(a). Pet. App. 1a. He was sentenced to serve two, concurrent, state-prison terms: one for life, and one for between a year and a year and a day. J.A. 88. The Massachusetts Supreme Judicial Court ("SJC") affirmed his convictions and the denial of his motion

for a new trial in a July 20, 2016 decision. Pet. App. 41a.

1. On August 10, 2003, fifteen-year-old Germaine Rucker was in Boston, Massachusetts, carrying a bag of jewelry that he was selling. Pet. App. 1a-2a; J.A. 90. According to an eyewitness, "a group of males varying in ages . . . rushed toward [Rucker]," a fight ensued with someone other than Rucker "thr[owing] the first punch," and another member of the group ran off with Rucker's bag. Pet. App. 2a-3a. Rucker was shot in the head and the back and left dead in the street. Pet. App. 1a-4a.

2. Following an investigation, Petitioner was indicted for the first-degree murder of Rucker and for unlicensed possession of a firearm. Pet. App. 9a-16a. In 2006, he was tried on those charges before a jury in the Massachusetts Superior Court. Pet. App. 1a. Petitioner was represented by "an experienced criminal defense lawyer" who had a "practice of thoroughly knowing his case" "and applicable law," and a "methodical approach to preparing a defense." J.A. 94, 97-98 & n.7, 105-06.

The jurors heard evidence that a young man was seen carrying a pistol and discarding a distinctive hat while fleeing the area. Pet. App. 3a-4a, 7a, 9a, 12a. The pistol described was consistent with the type of gun that was used to shoot Rucker, and the hat contained DNA matching Petitioner's profile and resembled one that police previously saw Petitioner wearing. Pet. App. 3a-4a, 7a, 9a, 12a. And, after questioning by detectives and his mother, Petitioner went with his mother to the police station, where he

told police, "'I shot Germaine Rucker.'" Pet. App. 1a, 16a.

The jury found Petitioner guilty of first-degree murder by deliberate premeditation and of the firearms offense. Pet. App. 1a.

3. Petitioner commenced a direct appeal to the SJC, where he was represented by new counsel. J.A. 96. While appellate proceedings were pending, in 2011, Petitioner moved for a new trial, claiming that his trial counsel was ineffective. Pet. App. 1a-2a. Among the bases for the motion was that the attorney failed to object to a closure of the courtroom during jury selection. Pet. App. 1a-2a, 38a-42a.

a. A different judge held an evidentiary hearing regarding that claim. Pet. App. 42a-54a. She found as follows.

During the two days of jury selection in Petitioner's case, the courtrooms were very crowded. Pet. App. 38a-39a, 43a-47a, 53a. They were not "large enough to provide seats" for the "large venire[s]" required for murder cases, "usually between sixty and 100 persons." Pet. App. 50a. On the first day, approximately ninety venire members assembled, occupying "every available seat." Pet. App. 38a-39a, 43a. The trial judge commented that "'the courtroom is almost but not quite large enough to accommodate everyone,'" and he referred to people "standing [] for some period of time." Pet. App. 43a-44a. "[T]hose standing were taken into the hall . . . to wait for open seats." Pet. App. 44a. On the second day, "the courtroom crowding was the same," "though perhaps

less so" "[a]fter the lunch break." Pet. App. 44a-45a, 47a, 53a.

On each of the two days, Petitioner's mother and at least one other interested person were denied entry to the courtroom by a court officer who told them it was closed for jury selection. Pet. App. 39a, 48a-53a, 56a. "[T]he courtroom remained closed to them and other members of the public for the duration of the empanelment." Pet. App. 52a-54a, 56a. "The sole reason . . . was the crowded condition in the courtroom." Pet. App. 39a, 53a.

At the end of the first day, "[Petitioner's mother] informed [defense counsel] that she had been refused entry." Pet. App. 49a. Then, "after the morning recess [on the second day], the [prosecutor] alerted the judge to the presence of the defendant's family and other interested parties outside the courtroom." Pet. App. 45a, 60a. He specifically referenced one individual who had "'testified [before] the grand jury,'" was "'a trial witness['s] boyfriend,'" and was "'seated amongst all the prospective jurors'"—adding that he did not "'think it [was] appropriate that [the individual] be out in the hallway with any other friends or associates of the defendant.'" Pet. App. 45a-46a. The prosecutor stated, "'We've taken some steps to make sure that none of the victim's family is up here, although certain one of them are [sic] and they're down on the sixth floor.'" Pet. App. 46a. "Echoing [the prosecutor's] point of view, defense counsel stated, 'If you want me to go out there and tell [the individual in the hallway] to pick some other floor, I'd be glad to.'" Pet. App. 46a (noting that "[n]othing in the record, however, suggest[ed]

any safety or jury-tampering issues involving" such individuals).

"[T]he defendant was unaware that the courtroom was closed or that he had a right to a public trial." Pet. App. 50a, 62a. And, "[b]ecause of his belief that the closure was constitutional, [defense counsel] did not discuss the matter with the defendant[,] suggest to him that his right to a public trial included the empanelment," or object. Pet. App. 39a-40a, 46a-49a & n.1, 60a. "[T]he failure to object was not a strategic choice." Pet. App. 49a-50a, 62a. "Nor did any party or the court voice any concern that the defendant's family was outside rather than inside the courtroom." Pet. App. 46a. "Understandably, the court's attention was focused on conducting an efficient, fair and uneventful empanelment without undue inconvenience to prospective jurors." Pet. App. 46a.

b. The motion judge arrived at the following conclusions.

"[T]here was a full closure of the courtroom, rather than a partial closure," and it was not trivial or *de minimis*. Pet. App. 39a, 56a-58a. The closure could not "be justified as a valid limitation of the defendant's Sixth Amendment rights" under the test established by *Waller v. Georgia*, 467 U.S. 39, 48 (1984).[1] Pet. App. 39a, 56a, 58a-60a; J.A. 89.

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[1] Under the *Waller* test, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable

"[T]he defendant . . . did not intentionally waive this right." Pet. App. 62a. But his public-trial claim was still unpreserved. Pet. App. 62a-65a; J.A. 88-89.

"Counsel's failure to object to the courtroom closure, stemming from a misunderstanding of the law governing the defendant's right to a public trial, . . . was not objectively reasonable." Pet. App. 40a, 63a-64a. However, Petitioner did not "offer[] any evidence or legal argument establishing prejudice" in the sense of "a substantial likelihood of a miscarriage of justice."[2] Pet. App. 40a, 64a. Thus, he was not entitled to relief. Pet. App. 65a.

4. Petitioner appealed the motion judge's decision. Pet. App. 2a. That appeal was consolidated in the SJC with his direct appeal of his convictions. Pet. App. 2a.

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alternatives to closing the proceeding, and it must make findings adequate to support the closure."

[2] The "substantial likelihood of a miscarriage of justice" standard is applied in reviewing ineffectiveness claims in direct appeals of first-degree murder convictions in Massachusetts. Pet. App. 30a-31a, 64a. "The court asks '[1] whether there was an error in the course of trial (by defense counsel, the prosecutor, or the judge), and, [2] if there was, whether that error was likely to have influenced the jury's conclusion.'" Pet. App. 30a-31a (quoting, with citation omitted, *Commonwealth v. Lang*, 473 Mass. 1, 19, 38 N.E.3d 262, 276 (2015) (Lenk, J., concurring)). The standard is "more favorable to a defendant than the Federal or State constitutional standards." *Commonwealth v. Mosher*, 455 Mass. 811, 827, 920 N.E.2d 285, 299 (2010); *accord Knight v. Spencer*, 447 F.3d 6, 10-11, 15 (1st Cir. 2006). (And the state constitutional standard is itself more favorable to defendants than the federal one. *See, e.g., Commonwealth v. Marinho*, 464 Mass. 115, 124, 981 N.E.2d 648, 657 (2013).)

The SJC reviewed Petitioner's case under the distinct procedures applicable to direct appeals of first-degree murder convictions in Massachusetts. Pet. App. 2a, 8a, 41a. Those procedures require the Commonwealth's highest court to conduct broad, plenary review of the record, giving consideration to all apparent legal and evidentiary issues, regardless of whether they were preserved below or raised on appeal. *See, e.g.*, Pet. App. 2a, 8a, 41a (observing that "review under [Mass. Gen. Laws ch. 278, § 33E] requires [the SJC] 'to consider all issues apparent from the record, whether preserved or not'" and gives it "extraordinary power" (quoting *Commonwealth v. Randolph*, 438 Mass. 290, 294, 780 N.E.2d 58, 64 (2002))).

The SJC rejected Petitioner's challenges. With respect to the courtroom-closure ineffectiveness claim, the court found the motion judge's factual determinations regarding the crowding, the closure, and the failure to object to be "supported by the evidence." Pet. App. 38a. The court also agreed that there was "a full, rather than partial, closure." Pet. App. 39a. It noted, but did not expressly ratify, the motion judge's determination that the *Waller* test was unmet. Pet. App. 38a.

The SJC agreed with the motion judge's determination that defense counsel's failure to object was not objectively reasonable. Pet. App. 40a. But the court also reaffirmed that:

> "Where the defendant has procedurally waived his Sixth Amendment public trial claim by not raising it at trial, and later raises the claim as one of ineffective assistance of counsel in a

> collateral attack on his conviction, the defendant is required to show prejudice from counsel's inadequate performance (that is, a substantial risk of a miscarriage of justice) and the presumption of prejudice that would otherwise apply to a preserved claim of structural error does not apply."

Pet. App. 40a (quoting *Commonwealth v. LaChance*, 469 Mass. 854, 856, 17 N.E.3d 1101, 1104 (2014)).

In *LaChance*, the SJC reasoned that "[p]resuming prejudice in this context ignores the distinct and well-established jurisprudence which governs claims of ineffective assistance of counsel." 469 Mass. at 858, 17 N.E.3d at 1105. The SJC recognized that this Court has presumed prejudice in the context of ineffectiveness claims "only in limited circumstances where the essential right to the assistance of counsel itself has been denied," such as "'[a]ctual or constructive denial of the assistance of counsel altogether,'" "'state interference with counsel's assistance,'" and "'an actual conflict of interest'" on counsel's part—none of which existed in LaChance's case. *Id.* at 859, 17 N.E.3d at 1106 (quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984), and citing *United States v. Cronic*, 466 U.S. 648, 659 & n.25 (1984)).

The *LaChance* court added that "to say that requiring a showing of prejudice forecloses the possibility of a remedy 'ignore[s]—at great cost to the public interest in the finality of verdicts—the established rule that public trial rights may be waived,' and that claims of ineffective assistance of counsel merit a new trial only where the error may

have affected the verdict." *Id.* at 859-60, 17 N.E.3d at 1106 (citation omitted) (quoting *Commonwealth v. Dyer*, 460 Mass. 728, 735 n.7, 955 N.E.2d 271, 281 n.7 (2011), and citing *Strickland*, 466 U.S. at 691). The court concluded that "[a]lthough it may be difficult to demonstrate prejudice in the context of a closed jury empanelment process," it would not "rule out that possibility." *Id.* at 859 n.3, 17 N.E.3d at 1106 n.3.

In Petitioner's case, the SJC declined to "revise the *LaChance* rule" and presume prejudice. Pet. App. 40a. Instead, it agreed with the motion judge that Petitioner "otherwise failed to show that trial counsel's conduct caused prejudice warranting a new trial." Pet. App. 40a. It noted that Petitioner "d[id] not dispute [on appeal] that he failed to demonstrate prejudice" and "ha[d] not advanced any argument or demonstrated any facts that would support a finding that the closure subjected him to a substantial likelihood of a miscarriage of justice." Pet. App. 40a-41a. Accordingly, the SJC upheld the denial of the ineffectiveness claim.

Finding other claims by Petitioner meritless, the SJC affirmed Petitioner's convictions and the denial of his motion for a new trial.[3] Pet. App. 41a.

SUMMARY OF THE ARGUMENT

A defendant's Sixth Amendment right to effective counsel is not violated unless the claimed

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[3] The court did find Petitioner entitled to "a corrected mittimus to reflect that his life sentence . . . carries with it the opportunity for parole consideration after fifteen years," given his juvenile status. Pet. App. 41a. He was sixteen at the time of his crime. Pet. App. 1a.

inadequacy in representation affected the judgment. This prejudice element derives from the purposes underlying the right. It bears on whether the adversarial process worked, the trial was fair, and its result was reliable. It also accounts for the gravity of upsetting a criminal conviction, and the potential damage to public confidence in the judicial system where convictions are reversed for errors that had no impact on the outcome.

Where a defendant has received the type of loyal advocate and adversarial testing contemplated by the Counsel Clause, he must prove a reasonable probability that counsel's deficiencies affected the verdict, in order to obtain a new trial. Under *Strickland v. Washington*, the burden is substantial, but not insurmountable, and it was intended to allow for relief where a trial's result has been rendered unreliable. 466 U.S. 668 (1984). While the right to effective assistance is never violated absent prejudice, in certain categories of cases this Court has relieved defendants of having to make individualized showings of prejudice. But these cases involve circumstances that are inherently highly prejudicial, comparable to a complete denial of counsel, creating a likelihood that prejudice actually arose.

This Court should not relieve a defendant of the *Strickland* prejudice requirement when he asserts an ineffectiveness claim based on a failure to object to a structural error. One reason is that doing so would disserve the important interests, recognized by this Court, in maintaining appropriate rules regarding waivers, forfeitures, and contemporaneous objections. The Constitution allows States to enforce rules requiring that constitutional rights be timely

asserted—including in the public-trial context. Such rules ensure that claims are addressed when they can be remedied effectively and without disruption; they prevent litigants from strategically withholding claims; and they promote the finality of judgments.

Another reason is that the distinct treatment of structural errors in the harmlessness context cannot be mechanically carried over to the analysis of whether an ineffectiveness violation has occurred. The structural-error rule generally provides that, when a defendant proves on direct appeal one of several constitutional violations that have been labeled as structural, a court must order relief without regard to harmlessness. The structural-error classification encompasses a wide range of defects with different characteristics that are remedied in different ways. Petitioner's sweeping rule would ignore those distinctions and have this Court treat them all the same.

Yet a third reason not to impose a presumption of prejudice is that, until now, this Court has dispensed with an assessment of harm for structural error only after a constitutional violation has actually been proven. By contrast, this Court has long held that an assessment of *Strickland* prejudice is necessary to determine whether there has been an ineffectiveness violation at all. Indeed, under *Strickland*, prejudice is not presumed simply because an attorney has made mistakes that have the pervasiveness of a structural error; rather, the defendant must still show that the attorney's errors actually affected his defense. Petitioner's approach would also allow for prejudice, and thus an effective-

counsel violation, to be found in at least some cases where there was none.

Fourth, imposing a presumption of prejudice in the *Strickland* context does not adequately account for the fact that assessments of harmlessness and *Strickland* prejudice do not involve the same burdens, standards of proof, or probability of injury. Simply put, forgoing a harmlessness analysis in the context of a proven constitutional error is different than presuming prejudice under *Strickland*, and a lack of harmlessness does not always mean that *Strickland* prejudice exists.

Finally, presuming prejudice would be especially unwarranted where an ineffectiveness claim is predicated on a courtroom closure. Contrary to Petitioner's contentions, while this Court has called public-trial errors structural, it has not found that any assessment of their impact would be inappropriate or infeasible.

And it would be particularly inappropriate to require a showing of prejudice where the ineffectiveness claim is based on the specific type of public-trial error at issue—the exclusion of spectators from a crowded courtroom during jury selection. The proceeding is observed by members of the public in the form of prospective jurors, and it does not involve the presentation of evidence or arguments on the merits of the charge.

In such situations, *Strickland* prejudice is highly unlikely to arise. But when it does, showing a reasonable probability of prejudice is not "impossible," at least where a defendant makes an attempt.

Had Petitioner tried to make such a showing, he would not likely have succeeded. But that is because there was no reasonable probability of a different result. Jury selection was not conducted in "secret." The courtroom was filled with members of the public in the form of prospective jurors, making it improbable that the addition of certain spectators would have been noticed by, much less affected, the participants. Moreover, there is no allegation of, or record support for, a finding that there was, any impropriety or breakdown in the adversarial process during jury selection. And no evidence or arguments on the merits of the charges were offered during that time. Finally, the prosecution's case against Petitioner was strong. Affirmance in this case would further the interests of justice.

ARGUMENT

I. A defendant who challenges a conviction based on his counsel's failure to object to a courtroom closure must show prejudice to establish a Sixth Amendment violation.

A defendant must show prejudice as a precondition for relief when claiming that his counsel was ineffective for failing to object to a public-trial violation or other structural error. A violation of the right to counsel is not complete without prejudice. And requiring it to be shown ensures that a criminal conviction is not set aside unless an attorney's errors affected a trial's result. Prejudice is presumed in only a few situations comparable to a complete deprivation of counsel, given the likelihood that it actually arose—circumstances not present where, as here, counsel's

only claimed error was to fail to object to the closure of the courtroom.

A. The right to counsel guarantees an effective advocate—even if an imperfect one.

"The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). The Counsel Clause seeks to ensure fairness through, among other things, an adversary process. *See, e.g., id.* at 684-700; *United States v. Cronic*, 466 U.S. 648, 653-66 (1984). It "recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685.

The involvement of defense counsel in such a system also "'advance[s] the public interest in [discovering the] truth'"—that is, in reaching the *correct* result. *Cronic*, 466 U.S. at 655-56 & nn.14-16, 22 (quoting *Polk County v. Dodson*, 454 U.S. 312, 318 (1981)). Underlying the Sixth Amendment is the "'premise . . . that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'" *Id.* at 655-56 & nn.14-16, 22 (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)); *see also Strickland*, 466 U.S. at 685-700 (placing emphasis on achieving "just results," "a trial whose result is reliable," and "confidence in the outcome").

Of course, "the Sixth Amendment does not guarantee the right to perfect counsel." *Burt v. Titlow*, 134 S. Ct. 10, 18 (2013). Rather, it guarantees effective counsel. *See, e.g.*, *Strickland*, 466 U.S. at 683-700; *Cronic*, 466 U.S. at 654-67. The Amendment demands that the defendant be assisted by a competent attorney who will be loyal, advocate for his interests, maintain independence from the government, and subject the prosecution's case to adversarial testing. *See, e.g.*, *Strickland*, 466 U.S. at 681-700; *Cronic*, 466 U.S. at 654-66.

Accordingly, "[r]epresentation is constitutionally ineffective only if it 'so undermined the proper functioning of the adversarial process' that the defendant was denied a fair trial." *Harrington v. Richter*, 562 U.S. 86, 110-11 (2011) (quoting *Strickland*, 466 U.S. at 686).

B. No violation of the right to effective assistance occurs unless inadequate representation affected the result of the proceeding.

"[A] violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006). That is, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U.S. at 692.

That makes sense. "[T]he very nature of the specific element of the right to counsel at issue [is] *effective* (not mistake-free) representation." *Gonzalez-*

Lopez, 548 U.S. at 147. "Counsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have)." *Id.*

Prejudice also serves as an important measure of whether the trial was fair or instead involved "a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 696, 700; *see also Gonzalez-Lopez*, 548 U.S. at 147 (explaining that the prejudice requirement stems from "the limits of" "the right to effective representation" that are derived from "the purpose of ensuring a fair trial").

Indeed, a prejudice analysis may provide the best estimation of whether, despite an attorney's errors, the trial produced the correct result. It considers "the totality of the evidence," what the "evidentiary picture" would have looked like without the errors, and whether the result would have been the same had they never occurred. *Strickland*, 466 U.S. at 695-96.

Prejudice is also an essential element of a violation because of the gravity of the consequence: vacating a conviction. This Court has long acknowledged that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 684-99.

Requiring prejudice for relief further serves an interest underlying the public-trial requirement—promoting public confidence in the justice system. As this Court has affirmed in other contexts, "[r]eversal

for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Johnson v. United States*, 520 U.S. 461, 470 (1997) (quoting R. Traynor, *The Riddle of Harmless Error* 50 (1970)).

C. The defendant generally must affirmatively show prejudice, in addition to deficient performance.

Where "a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred." *Cronic*, 466 U.S. at 656.

So, except in extraordinary situations discussed below, *see* Part I.E, *infra*, a defendant claiming a violation of the right to effective assistance must make two showings. *See Strickland*, 466 U.S. at 687-94. First, he "must show that counsel's performance was deficient," in that it "fell below an objective standard of reasonableness" "under prevailing professional norms," "in light of all the circumstances" and "viewed as of the time of counsel's conduct." *Id.* Second, he "must show that the deficient performance prejudiced the defense," in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

In making those showings, the defendant must overcome a "strong[] presum[ption that counsel] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 688-99. There is

likewise a "strong presumption" that the result of the proceeding is reliable. *Id.* at 687, 696.

D. Prejudice is assessed based on a "reasonable probability" standard that accounts for the interest in outcome reliability and the seriousness of the consequences of finding a violation of the right to effective counsel.

Strickland's reasonable-probability standard "finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness." *Strickland*, 466 U.S. at 694 (citations omitted) (citing *United States v. Agurs*, 427 U.S. 97, 104, 112-13 (1976), and *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-74 (1982)). The *Strickland* Court adopted it based on sound policy considerations.

The Court eschewed more lenient options that would have required a defendant merely "to show that the errors had some conceivable effect on the outcome of the proceeding" or that "the errors 'impaired the presentation of the defense.'" *Id.* at 693. As the Court explained, "[v]irtually every act or omission of counsel would meet [a 'conceivable effect' test], and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* (citation omitted). And "[s]ince any error . . . 'impairs' the presentation of the defense, the ['impairment'] standard is inadequate because it provides no way of deciding what impairments are

sufficiently serious to warrant setting aside the outcome of the proceeding." *Id.*

At the same time, the Court rejected a more demanding "more likely than not" or "preponderance of the evidence" standard. *Id.* at 693-97. Significantly, the Court appreciated that an ineffectiveness claim questions the reliability of the proceeding. *Id.* at 694. And it found the reasonable-probability standard more appropriate than the more burdensome standards, because "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* That is, the Court ensured that the standard it adopted would enable a defendant with a somewhat weaker ineffectiveness claim to nevertheless show that a proceeding had been rendered unreliable, and to obtain relief as a result.

If the standard cannot be met with ease, that is by design. But it is hardly insurmountable, and it provides an adequate vehicle for addressing situations where attorney error impacts a proceeding's reliability.

E. Prejudice is presumed only in a few situations comparable to a complete denial of counsel—a standard not met by a failure to object to a courtroom closure.

While a defendant never suffers a violation of the right to effective counsel absent prejudice, in a few situations he will be relieved of the burden of *showing*

prejudice. Instead, it will be presumed. But such a presumption arises "only in circumstances of [the] magnitude" of "where assistance of counsel has been denied entirely or during a critical stage." *Mickens v. Taylor*, 535 U.S. 162, 166 (2002). Thus, a defendant will not have to show prejudice where counsel was absent, entirely failed to test the government's case, deprived the defendant of an entire appeal, was saddled by divided loyalties, or was prevented by the state or other circumstances from assisting the defendant effectively.[4] As discussed further below, *see* Part II.C, *infra*, failure to object to a courtroom closure

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[4] *Strickland* identified "[a]ctual or constructive denial of the assistance of counsel altogether" and "various kinds of state interference with counsel's assistance" as bases for presuming prejudice. 466 U.S. at 683, 686, 692-93. Similarly, *Cronic* discussed circumstances where "the accused is denied counsel at a critical stage of his trial" and where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," further noting that "[c]ircumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate." 466 U.S. at 659-66 & nn.25, 26 (also referring to "surrounding circumstances"). Decisions have also referred to "when counsel [was] burdened by an actual conflict of interest." *Strickland*, 466 U.S. at 683, 686, 692-93 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980)); *see also Cronic*, 466 U.S. at 658-67 & nn.28, 31; *Mickens*, 535 U.S. at 166. And *Roe v. Flores-Ortega* discussed "denial of [an] entire judicial proceeding itself," specifically an appeal, "which a defendant wanted at the time and to which he had a right"; and even then, it required a presumption of prejudice only after the defendant "demonstrate[s] that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." 528 U.S. 470, 482-84 (2000).

is a far cry from "fail[ing] meaningfully to oppose the prosecution's case."

Moreover, this Court has emphasized that a presumption of prejudice applies to some of those constitutional violations only where a deprivation was complete. *See, e.g.*, *Bell v. Cone*, 535 U.S. 685, 696-98 & n.3 (2002) (explaining that "an attorney's failure to test the prosecutor's case . . . must be complete"); *Penson v. Ohio*, 488 U.S. 75, 88-89 (1988) (contrasting complete denial of appellate counsel with ineffectiveness, as when "counsel fails to press a particular argument on appeal" or "fails to argue an issue as effectively as he or she might"). *Strickland* prejudice has never been presumed outside of these limited circumstances. That is in large part because a failure to oppose the prosecution "at specific points" is different in kind than a failure "throughout [a] proceeding as a whole." *Bell*, 535 U.S. at 697.

The predominant reason this Court has presumed prejudice under *Strickland* is the likelihood—and not mere possibility—that prejudice actually arose. As the Court explained in *Cronic*, "[t]here are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[5] 466 U.S. at 658-67 & nn.28, 31; *see also, e.g.*, *Bell*, 535 U.S. at 695-96; *Mickens*, 535 U.S. at 166, 175.

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[5] As to certain presumptions, the Court added that the "circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Strickland*, 466 U.S. at 692-93.

Although the Court noted that the effect of one presumptively prejudicial form of attorney deficiency—where "counsel [was] burdened by an actual conflict of interest"—was "difficult to measure," that was not the sole reason for presuming prejudice. *Strickland*, 466 U.S. at 692 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980)). Indeed, *Cuyler* also "stressed the high probability of prejudice arising from multiple concurrent representation." *Mickens*, 535 U.S. at 166, 175 (citing *Cuyler*, 446 U.S. at 348-49). The Court has never suggested that prejudice should be presumed based solely upon whether it would be difficult to measure the effect of an attorney's error, regardless of the likelihood of prejudice.[6]

This basic limitation on presuming prejudice is consistent with the nature of ineffectiveness violations. Focusing on the likelihood of prejudice allows for a Sixth Amendment violation to be found where assuredly one occurred, and there was thus "a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687-700. In contrast, focusing on the difficulty of measuring harm alone would inevitably allow for prejudice to be found in at least some situations where there was none. Thus, criminal judgments would be set aside for violation of the right to effective counsel where no

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[6] Additional rationales for presuming prejudice where counsel labors under an actual conflict of interest are also specific to that situation. They include: the fact that conflicted counsel "breaches the duty of loyalty"; "the obligation of counsel to avoid conflicts of interest"; and "the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts." *Strickland*, 466 U.S. at 692.

such violation was "'complete.'" *Gonzalez-Lopez*, 548 U.S. at 147.

An attorney's failure to object to a courtroom closure does not involve any of the circumstances in which prejudice is presumed. It is not comparable to a complete denial of counsel. And, as discussed below, *see infra* Part II.C, it is not inherently likely to alter a trial's outcome. It is, at most, the type of specific mistake as to which a showing of prejudice is required. *See Strickland*, 466 U.S. at 683-96; *see also Bell*, 535 U.S. at 696-98; *Cronic*, 466 U.S. at 657 n.20, 666-67 & nn.41,42.

II. This Court should not modify the long-settled *Strickland* standard to relieve criminal defendants of the need to show prejudice in cases where counsel failed to object to a structural error.

The prejudice requirement that is so essential to the *Strickland* test should not be set aside for ineffectiveness claims predicated on structural errors. Allowing a presumption of prejudice in these circumstances would permit defendants to circumvent rules regarding waivers, forfeitures, and contemporaneous objections all too easily. It also would import a rule from the distinct area of harmlessness law, applicable to a range of different errors, into the *Strickland* context, for which it is ill suited. And in at least some situations, a constitutional violation will be found where there was none. Such a presumption would be particularly inappropriate with respect to the public-trial error at issue here. While prejudice from that error will occur only rarely, *Strickland* does not impose an impossible

burden for defendants seeking relief. In Petitioner's case, though, there was no effort to make such a showing, and any effort would likely have been unsuccessful given the improbability of prejudice.

A. Requiring defendants to show *Strickland* prejudice when claiming ineffectiveness for failure to object to a structural error is consistent with sound principles limiting relief for waived and forfeited claims.

Requiring defendants to show *Strickland* prejudice not only furthers the important interests underlying the requirement itself, but also promotes the effective functioning of the justice system in other ways. As this Court has explained:

> "An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial [or in pretrial proceedings], and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve."

Premo v. Moore, 562 U.S. 115, 122, 125 (2011) (quoting, with alteration, *Harrington*, 562 U.S. at 105); *cf. Michel v. Louisiana*, 350 U.S. 91, 101 (1955) (stating, in pre-*Strickland* direct appeal from state conviction, that it "would vitiate state rules of procedure designed to require preliminary objections to be disposed of before trial" to "infer lack of effective

counsel" from counsel's failure to file a timely motion alone).[7]

The principle that rights may be waived or forfeited is as much a part of the constitutional order as the rights themselves. "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.'" *Michel*, 350 U.S. at 99 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)); *accord, e.g.*, *United States v. Olano*, 507 U.S. 725, 731 (1993); *Coleman v. Thompson*, 501 U.S. 722, 751 (1991).

Likewise, "[i]t is beyond question that under the Due Process Clause of the Fourteenth Amendment [a State] may attach reasonable time limitations to the assertion of federal constitutional rights." *Michel*, 350 U.S. at 97; *accord Francis v. Henderson*, 425 U.S. 536, 540-42 (1976) (involving habeas corpus appeal). "[C]onsiderations of comity and federalism require that [federal courts] give no less effects to the . . . clear interests [in enforcing such rules] when asked to overturn state convictions" than when asked to reverse federal judgments. *Francis*, 425 U.S. at 541; *see also Coleman*, 501 U.S. at 745-51 (affirming, in habeas action, that "[n]o less respect

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[7] The SJC recognized that Petitioner "'procedurally waived'" his public-trial claim. Pet. App. 39a-40a (quoting *Commonwealth v. LaChance*, 469 Mass. 854, 856, 17 N.E.3d 1101, 1104 (2014)); *see also* Pet. App. 62a-65a; J.A. 88-89 & n.2. There was thus a "forfeiture," in federal parlance. *See United States v. Olano*, 507 U.S. 725, 733-34 (1993).

should be given to state rules of procedure," in light of such considerations).

Public-trial claims that were not raised in accordance with federal or state procedure are no exception. Indeed, in the *Waller v. Georgia* direct appeal, this Court did not require relief in the absence of an objection. 467 U.S. 39 (1984). It "h[e]ld that under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in [*Press-Enterprise Co. v. Superior Court* (*Press-Enterprise I*), 464 U.S. 501 (1984),] and its predecessors." *Waller*, 467 U.S. at 40, 42 & n.2, 47 & n.6.; *see also Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 7 (1986) (describing *Waller* similarly). And it expressly allowed "[t]he state courts [to] determine on remand whether [one defendant was] procedurally barred from seeking relief as a matter of state law." *Waller*, 467 U.S. at 42 n.2. Though the state's supreme court had "considered [that defendant's] objections . . . on their merits," his trial counsel had failed to object and in fact "concurred in the prosecution's motion to close the suppression hearing." *Id.* *See also Peretz v. United States*, 501 U.S. 923, 936-37 (1991) (citing *Levine v. United States*, 362 U.S. 610, 619 (1960), for the proposition that the failure to object to a courtroom closure waives the right to a public trial, depriving the defendant of any constitutional protection); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 895-96 (1991) (Scalia, J., joined by O'Connor, Kennedy & Souter, JJ., concurring) ("First Amendment free-speech rights . . . or the Sixth Amendment right to a trial that is 'public,' provide benefits to the entire society more important than

many structural guarantees; but if the litigant does not assert them in a timely fashion, he is foreclosed.").

The same is true in other structural-error situations. Where a defendant timely raises a claim of racial discrimination in selecting a grand jury, her indictment must be dismissed. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 257 (1988) (citing *Vasquez v. Hillery*, 474 U.S. 254 (1986)). But, "under the Due Process Clause . . . [the State] may require prompt assertion of the right to challenge discriminatory practices in the make-up of a grand jury" and deny relief when that requirement is unmet. *Michel*, 350 U.S. at 97; *accord Francis*, 452 U.S. at 540-42; *see also Coleman*, 501 U.S. at 745-46 (discussing *Francis* with approval).

Nor does this Court set aside other claim-processing rules that call for prejudice to be shown before a defaulted structural error can be remedied. *See Francis*, 425 U.S. at 542 & n.6 (affirming need for cause and actual prejudice to overcome procedural default in habeas challenge to state conviction, notwithstanding "'[t]he presumption of prejudice which supports the existence of the right'" (quoting *Davis v. United States*, 411 U.S. 233, 245 (1973))).

Such restraint is both prudent and necessary to the efficient functioning of a criminal trial. Waiver and forfeiture rules, and the contemporaneous objection rules that often underlie them, provide for defects to be addressed before the parties and court proceed further. *Id.* at 540. As this Court has explained:

> To the greatest extent possible all issues which bear on [the] charge should be determined in [the same] proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.

Wainwright, 433 U.S. at 90.

Such rules also prevent defendants from withholding an objection until a point when the issue, and any consequent retrial, become harder for the prosecution to litigate. *See Francis*, 425 U.S. at 540-41; *see also, e.g.*, *Puckett v. United States*, 556 U.S. 129, 134 (2009) ("The contemporaneous objection rule prevents a litigant from sandbagging the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor."); *Freytag*, 501 U.S. at 895 (Scalia, J., joined by O'Connor, Kennedy & Souter, JJ., concurring) ("To abandon" "the principle that a trial on the merits, whether in a civil or criminal case, is the 'main event,' and not simply a 'tryout on the road' to appellate review" "is to encourage the practice of 'sandbagging': suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if

the outcome is unfavorable—claiming that the course followed was reversible error.").

These important and long-recognized interests are seriously undermined where a defendant who claims that his counsel was ineffective for failing to object to a structural error is relieved of having to show an effect on his trial. The result is that the waiver or forfeiture would be largely excused. "Any defendant who could not make the prejudice showing necessary to have a defaulted claim of structural error considered could bypass that requirement by merely dressing that claim in ineffective assistance garb and asserting that prejudice must be presumed." *Purvis v. Crosby*, 451 F.3d 734, 743 (11th Cir. 2006); *see also Commonwealth v. LaChance*, 469 Mass. 854, 858-60 & n.2, 17 N.E.3d 1101, 1105-06 &n.2 (2014) (emphasizing significance of procedural waiver rule, and distinction between public-trial and ineffectiveness claims); *State v. Pinno*, 356 Wis. 2d 106, 153, 850 N.W.2d 207, 230 (2014) ("[A] rule that prejudice must be presumed when counsel fails to object to the exclusion of the public would effectively nullify the forfeiture rule.").

In fact, the approach of withholding an objection in favor of a later ineffectiveness claim would become more attractive to defendants. *See LaChance*, 469 Mass. at 860, 17 N.E.3d at 1106-07 (recognizing that "'counsel can harbor error as an appellate parachute by failing to object to the closure of trial, thereby depriving the trial court of the opportunity to correct the error at the time it occurs'" (quoting *People v. Vaughn*, 491 Mich. 642, 673-74, 821 N.W.2d 288, 308 (2012))); *Reid v. State*, 286 Ga. 484,

488, 690 S.E.2d 177, 181 (2010) (similar); *State v. Butterfield*, 784 P.2d 153, 157 (Utah 1989) (similar).

Arguing otherwise, Petitioner contends that, "[i]f counsel declined to raise an objection for tactical reasons like that, performance would not be deficient." Br. 35. However, we might never know that counsel's reasons were tactical. And if we did, a court might still find deficient performance on the grounds that such tactics are not reasonable and sound from a legal standpoint. *See Wood v. Allen*, 558 U.S. 290, 303 n.3 (2010) (recognizing distinction between "whether a decision was strategic" and "whether a strategic decision was reasonable"); *Massaro v. United States*, 538 U.S. 500, 504-05 (2003) (recognizing relevance of whether strategy was "reasonable" and "sound"). Petitioner asserts that few would "gamble with their clients' rights in that way," particularly as the "strategy would require the lawyer to accept a finding that he had been incompetent." Br. 35. But an attorney could conclude that an objection would be highly unlikely to affect the trial's outcome, whereas a failure to object, combined with a willingness to keep his thought process to himself and later say "*mea culpa*," could serve his client well on appeal. A zealous advocate might opt for the latter, as Members of this Court have aptly recognized in other contexts. *See Henderson v. United States*, 133 S. Ct. 1121, 1134-35 (2013) (Scalia, J., joined by Thomas & Alito, JJ., dissenting) (stating, as to the notion that there is "no harm in [the] evisceration of the contemporaneous-objection rule" and as to "disbelie[f] that a lawyer would 'deliberately forgo objection *now* because he perceives some slightly expanded chance to argue for 'plain error' later,'" that, "[w]here a criminal case always has been, or has at

trial been shown to be, a sure loser with the jury, it makes entire sense to stand silent while the court makes a mistake that may be the basis for undoing the conviction." (citation omitted)).

Finally, Petitioner suggests that enforcing both state forfeiture rules and the *Strickland* prejudice standard would injure him twice. Br. 32-33. But presuming prejudice would excuse him twice. If the defense took issue with the exclusion of spectators at his trial, it should have objected. It did not. Petitioner's ineffectiveness claim then provided "'a way to escape . . . [his] forfeiture'"—a second chance. *Premo*, 562 U.S. at 125 (quoting *Harrington*, 562 U.S. at 105). Yet, instead of making an attempt to show the prejudice that is required to establish a violation to the right to effective assistance of counsel, he has asked that the prejudice requirement be abandoned. Declining this request would not be unfair.

B. This Court should not import harmlessness law's special treatment for structural errors into the distinct *Strickland* prejudice context.

At bottom, Petitioner's arguments in support of his ineffective-assistance-of-counsel claim are grounded less in the ineffectiveness principles discussed above, and more in precepts from the distinct area of harmlessness law. *E.g.*, Br. 19-20, 26-29. Those precepts include a classification of certain errors as "structural," and a rule that courts should not assess harmlessness when such an error is proven. This Court should decline Petitioner's invitation to merge these two distinct lines of doctrine.

1. The structural-error classification relates to the extent of harmlessness review for certain constitutional violations, once those violations have been shown to have occurred.

The "structural error" concept has been applied only in the context of harmlessness review. *See Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991); *Hedgpeth v. Pulido*, 555 U.S. 57, 67 (2008) ("In those limited instances in which this Court has found an error 'structural,' [it has] done so because the error defies analysis by harmless-error standards."). But even there, such errors have come in many different forms; the nature of the rights or interests that they seek to protect varies; and the remedies for such errors differ.

Harmless-error review considers whether, notwithstanding the existence of a proven constitutional violation, a court must decline to reverse the conviction because the error did not affect the outcome of the trial. On direct review, the government normally has the burden of showing harmlessness beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24-26 (1967). The structural-error classification was first devised in *Fulminante* by reference to the set of errors as to which the Court had previously declined to require such harmlessness review. *See Fulminante*, 499 U.S. at 309-10.

However, "'structural errors[]' [is] a category [this Court has] never defined clearly." *United States*

v. Marcus, 560 U.S. 258, 270 (2010) (Stevens, J., dissenting). Exactly which errors fall within that set is not well settled. *Compare, e.g., Johnson v. United States*, 520 U.S. 461, 468-69 (1997) (listing six),[8] *with, e.g.*, 7 W. LaFave, et al., Criminal Procedure § 27.6(d) (4th ed. 2015) (listing twelve errors that the authors view as structural based on their treatment by this Court, not including those involving the right to counsel, and several others on which lower courts tend to agree or disagree); 3B C. Wright & P. Henning, Federal Practice and Procedure § 855 (4th ed. 2013 & Jan. 2017 supp.) (similar).[9]

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[8] The Court stated in *Johnson*: "We have found structural errors only in a very limited class of cases: See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (a total deprivation of the right to counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (lack of an impartial trial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (unlawful exclusion of grand jurors of defendant's race); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (the right to self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (the right to a public trial); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (erroneous reasonable-doubt instruction to jury)."

The Court has added to the list since *Johnson*, but sparingly. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909-10 (2016) (recognizing "[a judge's] unconstitutional failure to recuse" as structural); *Gonzalez v. United States*, 553 U.S. 242, 253 (2008) ("The Court held in *Gomez v. United States*, 490 U.S. 858 (1989), that imposition of a magistrate judge over objection was structural error."); *Gonzalez-Lopez*, 548 U.S. at 148-52 & n.4 (recognizing denial of counsel of choice as structural).

[9] Additional errors listed in LaFave, excluding those involving the right to counsel, include: "[1] discrimination in the selection of the petit jury; [2] the improper exclusion of a juror because of his views on capital punishment; . . . [and 3] the denial of any opportunity to make closing argument, or of consultation

This lack of clarity may result from confusion about whether this Court's discussion of the errors' characteristics should be viewed as a mere description of those constitutional violations previously held not susceptible to harmlessness review, or as a test for adding new ones to the list—and, if the latter, whether an error must have all of those characteristics or only certain ones. Further uncertainty arises from this Court's recognition that, even if a "*complete denial* of [a right] amounts to structural error," it cannot be assumed that a "*restriction* of [that right] also amounts to structural error." *Glebe v. Frost*, 135 S. Ct. 429, 431 (2014) (explaining that "[t]hat is all the more true because [the Court's] structural-error cases 'ha[ve] not been characterized by [an] 'in for a penny, in for a pound' approach'" (quoting *Neder v. United States*, 527 U.S. 1, 17 n.2 (1999))).

Moreover, structural errors have different characteristics and are grounded in various constitutional provisions. Some concern trial proceedings, while others concern events before trial. Some concern the legal representation afforded a

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between defendant and his counsel during an overnight trial recess" (footnotes omitted).

Other situations listed in Wright & Henning, but not involving the right to counsel, include: "[1] violation of a defendant's double jeopardy right; . . . [2] the community in which defendant was tried has been exposed to so much damaging publicity that he cannot get a fair trial there; . . . [3] the constitutional test for a violation already required a showing of prejudice; . . . [4] violation of the constitutional right to speedy trial; . . . [and 5] appointment of an interested prosecutor" (footnotes omitted).

defendant, while others concern the identity or actions of jurors or court officials. And the reasons for treating them distinctly have varied from one error to another.[10]

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[10] Certain decisions provided little if any separate justification for dispensing with a harmlessness analysis. *See Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (right to counsel); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (biased judge).

Other decisions provided a variety of justifications. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909-10 (2016) (failure of appellate judge to recuse; noting that panel's deliberations are confidential, interested judge may influence others even if judge's vote is not dispositive, and appearance and reality of neutrality are essential for the institution); *Gonzalez-Lopez*, 548 U.S. at 148-52 & n.4 (denial of counsel of choice; "rest[ing its] conclusion . . . upon the difficulty of assessing the effect of the error," but referring also to "fundamental unfairness," "the irrelevance of harmlessness," and the extent to which the error bears on the framework of the trial as criteria cited in past cases); *Sullivan v. Louisiana*, 508 U.S. 275, 280-82 (1993) (defective reasonable-doubt instruction; reaching conclusion largely because, "[t]here being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless," and because "the jury guarantee [is] a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function"); *Gomez v. United States*, 490 U.S. 858, 876 (1989) (jury selection by magistrate judge; citing basic nature of "defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside"); *Vasquez v. Hillery*, 474 U.S. 254, 260-66 (1986) (discriminatorily chosen grand jury; relying largely on: the importance of the defendant's equal protection rights and of eliminating racial discrimination in society; the fact that such discrimination "is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the State to prevent"; the fact that "alternative

Significantly, structural errors have also been remedied in different ways. *Compare, e.g.*, *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (explaining that "some [errors] will always invalidate the conviction" and citing denials of counsel, impartial judge, and self-representation as examples), *and Bank of Nova Scotia*, 487 U.S. at 257 (recognizing that "racial discrimination in selection of grand jurors compel[s] dismissal of the indictment"), *with Waller*, 467 U.S. at 49-50 (calling for new suppression hearing as opposed to new trial, at least initially, as a result of original hearing's closure to public, as "the remedy should be appropriate to the violation").

2. The rule for proven structural errors is inappropriate for the *Strickland* test.

The rule providing that courts should dispense with the normal assessment of impact in the case of structural errors cannot logically be imported into the *Strickland* framework. To do so would fundamentally change the right to effective assistance of counsel as this Court has long described it. It would disregard the different characteristics of the errors within the structural category, many of which do not directly relate to the matters that are central to the *Strickland*

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remedies are ineffectual"; the capacity of the discrimination to impact the proceedings; and the difficulty of assessing whether it has); *Waller*, 467 U.S. at 49-50 & n.9 (closure of suppression hearing; citing decisions discussing difficulty of demonstrating harm, and intangible societal loss, in affirming that defendants did not need to show specific prejudice); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of self-representation; stating that right is one that "when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant").

test—such as the impact on the verdict and its reliability. And, it would inevitably result in findings of prejudice and effective-assistance violations where, in reality, there was none. Incorporating such a rule for the group of structural errors *en masse* would represent a substantial and unwise change to the criminal justice system.

The structural-error rule was developed for situations where a constitutional violation has already been proven, and the question is whether a court should nevertheless deny relief on the basis of harmlessness. But in undertaking a *Strickland* analysis, a court is addressing the initial fundamental question of whether a violation of the right to effective counsel actually occurred. And the question of whether such a constitutional violation occurred depends in part on whether counsel's errors prejudiced the defense.

That distinction holds even where an attorney's defects pervade a trial in the way that a structural error might, as this Court recognized in *Gonzalez-Lopez*. 548 U.S. at 150. There, the defendant asserted a different type of Sixth Amendment claim—one alleging he was denied his counsel of choice. *Id.* As this Court would later explain, it held in *Gonzalez-Lopez* "that the wrongful deprivation of choice of counsel is 'structural error,' immune from review for harmlessness, because it 'pervades the entire trial.'" *Kaley v. United States*, 134 S. Ct. 1090, 1102 (2014) (quoting *Gonzalez-Lopez*, 548 U.S. at 150); *see also id.* at 1107 (Roberts, C.J., joined by Breyer & Sotomayor, JJ., dissenting) (similar). But the *Gonzalez-Lopez* Court contrasted that claim with an ineffectiveness claim, which requires a showing of prejudice

regardless of the pervasiveness of any attorney errors. 548 U.S. at 146-51. As the Court explained:

> The Government acknowledges that the deprivation of choice of counsel pervades the entire trial, but points out that counsel's ineffectiveness may also do so and yet we do not allow reversal of a conviction for that reason without a showing of prejudice. But the requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue; it is not a matter of showing that the violation was harmless, but of showing that a violation of the right to effective representation *occurred*.

Id. at 150. *See also Premo*, 562 U.S. at 128-30 (explaining that a harmlessness inquiry on direct appeal "presumes a constitutional violation, whereas *Strickland* seeks to define one"); *Lockhart v. Fretwell*, 506 U.S. 364, 370 n.2 (1993) (similar).

Just as prejudice is not presumed because the defendant alleges a form of inadequacy having the pervasiveness of a structural error, it should not be presumed because he alleges ineffectiveness based on the failure to object to such an error. A contrary rule would inevitably allow for a result the Sixth Amendment does not permit: a finding of *Strickland* prejudice in at least some situations where it did not exist. In those cases, criminal judgments would be set aside for violation of the right to effective counsel where none occurred.

Moreover, Petitioner errs in reasoning that statements made by this Court about the difficulties

in proving harm under *Chapman* apply equally to proving prejudice under *Strickland*. *E.g.*, Br. 28. *Chapman* requires the government to show that an error was harmless beyond a reasonable doubt, 386 U.S. at 24, while *Strickland* requires the defendant to show that an error was prejudicial by a reasonable probability, 466 U.S. at 694. The standards thus implicate different burdens of proof and different probabilities of prejudice. In light of the difference in standards, *Strickland* prejudice connotes a higher probability of injury than does *Chapman* harm. *See United States v. Dominguez Benitez*, 542 U.S. 74, 86 (2004) (Scalia, J., concurring). Accordingly, the fact that an error is deemed harmful in the *Chapman* sense does not mean that it was prejudicial in the *Strickland* sense.

This Court thus recognized in *Premo* that the "prejudice" or "harmless-error" standard applied "on direct review following an acknowledged constitutional error" "cannot apply to determinations of whether inadequate assistance of counsel prejudiced a defendant." 562 U.S. at 128-30 (stating as much in context of plea agreement). And the conclusions reached in a harmlessness inquiry in a particular case "say[] nothing about prejudice for *Strickland* purposes." *Id.* "The lesson of *Premo* is that *Strickland* bears its own distinct substantive standard for a constitutional violation; it does not merely borrow or incorporate other tests for constitutional error and prejudice." *Walker v. Martel*, 709 F.3d 925, 940 (9th Cir. 2013).

This Court has similarly noted the problems associated with importing the structural-error concept into other areas wholesale, without

considered case-by-case adjudication.[11] For example, it recognized that "[t]he standard for determining whether an error is structural is not coextensive with" the exception under *Teague v. Lane*, 489 U.S. 288 (1989), allowing for retroactive application on collateral review of new watershed criminal-procedure rules. *Tyler v. Cain*, 533 U.S. 656, 665-67 & n.7 (2001) (citation omitted) (rejecting argument that, because error had been held to be structural, it necessarily represented watershed rule). Thus, "a holding that a particular error is structural does not logically dictate the conclusion that the second *Teague* exception has been met." *Id.*

Similarly, that an error has been deemed structural does not logically dictate that the second *Strickland* prong has been met when the error is not challenged by objection. As noted above, prejudice has been presumed in the effective-assistance context only in limited circumstances comparable to a complete denial of counsel; a failure to object to a discrete trial event is very different. *See* Part I.E, *supra*. Nor are all structural errors, which come in many different forms, inherently or equally likely to alter the result of a proceeding. *See, e.g.*, *Gonzalez-Lopez*, 548 U.S. at 148-52 & n.4 (denial of counsel of choice); *Waller*, 467 U.S. at 49-50 & n.9 (closure of a suppression hearing

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[11] Changing the *Strickland* test for this group of errors *en masse* would also be at odds with the sound "common-law method [of] taking cases and controversies as they present themselves, proceeding slowly and incrementally, building on what came before," and "evaluating [guarantees] one by one," thereby "scrutiniz[ing] more closely the right at issue in any given dispute, reducing both the risk and the cost of error." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 881 (2010) (Stevens, J., dissenting).

in its entirety over objection and without sufficient justification); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of self-representation); *Gomez v. United States*, 490 U.S. 858, 876 (1989) (selection of a jury by a magistrate judge in excess of his jurisdiction, "in a felony case . . . , despite the defendant's objection and without any meaningful review by a district judge"). Thus, the rule advocated by Petitioner would dramatically, and without limiting principle, expand the range of presumptions for ineffectiveness, and thus the number of cases in which defendants' convictions are set aside despite the lack of a timely objection. And yet, in many of those cases there will have been no prejudice and thus no violation at all.

The failure to object to a structural error also does not necessarily implicate the purposes underlying the *Strickland* prejudice requirement. In particular, an attorney's failure to object to the exclusion of spectators during jury selection does not inherently deprive the defendant of the loyal advocate or adversarial testing of the evidence that the Sixth Amendment was intended to guarantee. Nor does it necessarily serve as a valid measure of the correctness of the verdict. Indeed, whether any kind of error is designated as structural does not necessarily depend on its correlation to the accuracy of the verdict. *See* Part II.B, *supra*.

It follows from all of the above that a rule from the harmlessness context that requires courts to dispense with any assessment of a structural error's impact should not be mechanically carried over to *Strickland*. And certainly, the rule should not be carried over in blanket fashion for the wide range of structural errors to which an attorney might fail to

object. *See* Part II.B, *supra*. That would be inconsistent with "the case-by-case prejudice inquiry that has always been built into the *Strickland* test." *Lockhart*, 506 U.S. at 369 & n.2. As *Strickland* correctly tells us, "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice." 466 U.S. at 693.

C. Presuming prejudice is inappropriate where, as here, an ineffectiveness claim is based on a failure to object to the exclusion of spectators from jury selection.

Presuming prejudice is especially unwarranted as to an ineffectiveness claim involving the particular error here: the failure to object to the exclusion of spectators from jury selection.

Massachusetts shares Petitioner's appreciation for the constitutional imperative of public criminal proceedings, including those involving jury selection. As the SJC has recognized, allowing public access provides "'an effective restraint on possible abuse of judicial power'" and "'enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system,'" among other benefits. *Commonwealth v. Cohen (No. 1)*, 456 Mass. 94, 106-07, 921 N.E.2d 906, 917-18 (2010) (quoting *In re Oliver*, 333 U.S. 257, 270 (1948), and *Press-Enterprise I*, 464 U.S. at 508, respectively). And as jury-selection proceedings "are 'a crucial part of any criminal case'" and themselves "'promote[] fairness,'" they are among the proceedings that the public must

be able to observe. *Id.* (quoting *Owens v. United States*, 483 F.3d 63 (1st Cir. 2009), and *Press-Enterprise I*, 464 U.S. at 508, respectively).

But, as discussed further below, Petitioner errs in arguing that there should be no assessment of whether the failure to object in his case affected its outcome. First, while this Court has called public-trial errors structural, it has not suggested that they do not lend themselves to impact assessments. Second, presuming prejudice is particularly unwarranted when the violation involved the exclusion of spectators from a crowded courtroom during jury selection, given the nature of that portion of the proceedings. Third, in such situations, prejudice is highly improbable, but contrary to Petitioner's suggestion, *Strickland* does not impose an impossible burden.

1. The nature of a limited public-trial violation does not necessitate presuming prejudice.

Petitioner errs in arguing for an exception to *Strickland*'s prejudice requirement where an attorney fails to object to a limited public-trial violation. In addition to relying on pronouncements about structural errors generally, his argument is grounded in two premises. The first is that this Court has supposedly found that, because public-trial errors are "'always'" and "'necessarily'" unfair, "prejudice is presumed as a matter of law." Br. 6, 13, 19, 20, 25 (quoting *Neder*, 527 U.S. at 9). The second is that this Court has said it would be impossible for defendants in such situations to show prejudice, including the

type contemplated by *Strickland*. Br. *passim*. Each of these underlying premises is invalid.

This Court has never held that the characteristics of a public-trial violation are such that prejudice is presumed and its impact may never be assessed. Petitioner relies on *Waller*, which involved a suppression hearing that was closed in its entirety. 467 U.S. 39. But there, the Court did not announce an automatic reversal rule and instead evinced concern about upsetting a judgment if the closure had no effect on the proceedings. *See id.* at 49-50. To avoid providing a "windfall for the defendant," which would not be "in the public interest," the Court held that "[a] new trial need be held only if a new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial, or in some other material change in the positions of the parties." *Id.* (explaining that "the remedy should be appropriate to the violation"). The Court thus conditioned the new trial on whether the subsequent suppression hearing (a) resulted in the suppression of evidence that was not barred at the original trial, or a change in a party's position *and* (b) whether that evidence or change was "material." And materiality is little different than *Strickland* prejudice. *See Strickland*, 466 U.S. at 694 ("[T]he appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness." (citation omitted)).

Moreover, while the *Waller* Court agreed that "the defendant should not be required to prove specific

prejudice in order to obtain relief for a violation of the public-trial guarantee," 467 U.S. at 49, that is no different than the rule for many constitutional errors on direct review, where the government generally bears the burden of showing harmlessness beyond a reasonable doubt, *see Chapman*, 386 U.S. at 24-26.[12] Such a rule does not require a presumption of prejudice on an associated *Strickland* claim. For example, "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." *Deck v. Missouri*, 544 U.S. 622, 635 (2005) (adding that state must satisfy *Chapman* standard). Yet a defendant is still required to show prejudice in claiming his counsel was ineffective for failing to object to shackling. *See, e.g.*, *Roche v. Davis*, 291 F.3d 473, 484 (7th Cir. 2002) (ultimately finding that counsel's failure to object to, and take measures to conceal, shackles during sentencing was prejudicial).

Petitioner also relies heavily on this Court's statement that, where there has been structural error, "'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as

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[12] Not all of this is clear from Petitioner's brief. It incorrectly states that defendants normally need to show prejudice to obtain relief for a non-structural error. *Compare* Br. 3-4 ("unless the defendant can show" (citing *Sullivan*, 508 U.S. at 279)) *with Sullivan*, 508 U.S. at 279 ("if the State could show"). It also imprecisely cites *Waller* for the notion that "prejudice is presumed as a matter of law" on a public-trial claim. Br. 6, 19, 20, 28. And the brief nowhere acknowledges the specific remedial approach taken in *Waller*.

fundamentally fair.'" *Fulminante*, 499 U.S. at 310 (quoting, with internal citation omitted, *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)); *accord Neder*, 527 U.S. at 8-9. But *Strickland* specifically took account of the need to ensure reliability in selecting the "reasonable probability" standard. 466 U.S. at 694. And the *Rose* Court that originally stated the above words was commenting only on the denial of an "impartial judge" or "represent[ation] by counsel." 478 U.S. at 577-78. *Rose* made no reference to public-trial issues, even as it followed *Waller*.[13] *Fulminante* and *Neder* then repeated the statement in dicta providing a historical overview regarding a series of different structural errors. *Fulminante*, 499 U.S. at 310; *Neder*, 527 U.S. at 8-9. The opinions should not be read as retroactively assigning to public-trial violations a rationale that was expressly limited to other violations.

The second premise underlying Petitioner's argument—that this Court has called proving prejudice impossible—is based on a footnote in *Waller* referencing the difficulty that defendants may have in "prov[ing] specific prejudice" from a public-trial

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[13] In fact, *Rose* affirmed that, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." 478 U.S. at 579; *accord, e.g.*, *Marcus*, 560 U.S. at 265; *Neder*, 527 U.S. at 8. "Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed," the Court added. *Rose*, 478 U.S. at 579.

violation.[14] 467 U.S. at 49 & n.9. While the Court did not elaborate on the term "specific prejudice," the "demonstrat[ion of] prejudice" feared by the *Waller* defendants involved showing that "[the] motion to suppress *would have been granted* if the hearing had been open." Reply Brief for Petitioners in *Waller v. Georgia*, O.T. 1983, Nos. 83-321, 83-322, 1984 WL 563981, at 3 n.2 (emphasis added). Proving prejudice in that sense would involve more than the reasonable probability of a different outcome that *Strickland* requires. *Cf. Morris v. Slappy*, 461 U.S. 1, 28 n.9 (1983) (Brennan, J., joined by Marshall, J., concurring) ("There is a difference between a requirement that a defendant suffer some prejudice and a requirement that he show some specific prejudice.").

Petitioner's proposed rule thus finds no sound basis in this Court's public-trial precedents.

2. Presuming prejudice from the failure to object to the exclusion of spectators from jury selection is inappropriate.

Just as there is variation among structural errors, *see* Part II.B, *supra*, there is variation among public-trial errors. They differ based on the stage at

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[14] Given the placement of such statements in *Waller*, and the fact that some of them are merely contained in parentheticals following citations to lower-court opinions, the extent to which they were central to the Court's decision is questionable. *Cf. United States v. Bobo*, 419 F.3d 1264, 1268-69 (11th Cir. 2005) ("[C]ourts generally do not make a habit of hiding away important holdings in afterthought footnotes.").

which they occur, the extent of their severity, and other factors. At one end of the spectrum, a preliminary hearing on an insignificant matter of trial procedure might be closed for fifteen minutes without a judge's knowledge. At the other end of the spectrum, a trial could be closed to all members of the public for its entirety. Petitioner has offered no persuasive basis for treating all such violations the same under *Strickland*. *Cf. Waller*, 467 U.S. at 50 ("[T]he remedy should be appropriate to the violation."); *Glebe*, 135 S. Ct. at 431 (stating, as to the recognition of new structural errors, "our structural-error cases 'ha[ve] not been characterized by [an] 'in for a penny, in for a pound' approach'" (quoting *Neder*, 527 U.S. at 17 n.2)); *Marcus*, 560 U.S. at 264-65 (explaining that a showing of prejudice should not be dispensed with as to a certain category of errors, as they "come in various shapes and sizes," they vary based on "[t]he kind and degree of harm" and the manner in which they may be remedied at trial, and there is "no reason to believe that *all or almost all* such errors *always*" have the characteristics of a structural error).

And presuming prejudice is especially unwarranted with respect to the specific type of public-trial violation at issue here—recognized as such in *Presley v. Georgia*, 558 U.S. 209 (2010)—where spectators are excluded from jury selection.

Even where spectators are denied entry, jury-selection proceedings are necessarily subject to public observation in a way that other closed proceedings are not. The hearing in *Waller* was "closed to all persons other than witnesses, court personnel, the parties, and the lawyers." 467 U.S. at 42. This was problematic, as "'judges, lawyers, witnesses, and

jurors will perform their respective functions more responsibly in an open court than in secret proceedings.'" *Id.* at 46 & n.4 (parenthetically quoting *Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring)). But such secrecy does not exist where a juror voir dire proceeding is observed by a courtroom filled with members of the general public in the form of prospective jurors. *Cf. Press-Enterprise II*, 478 U.S. at 12-13 (explaining that public access to preliminary hearing was made more significant by "the absence of a jury, long recognized as 'an inestimable safeguard against the corrupt or overzealous prosecutor and against the [compliant], biased, or eccentric judge'" (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968))).[15]

Moreover, while *Waller* discussed the benefits of public trials generally, it gave much attention to the characteristics of suppression hearings in particular: "witnesses are sworn and testify"; "counsel argue their positions"; "[t]he outcome frequently depends on a resolution of factual matters"; that outcome may prompt a plea bargain; and there are often "attacks [on] the conduct of police and prosecutor," which the public has a "strong interest" in "scrutin[izing]." 467 U.S. at 46-47 & n.5. Indeed, "[t]he need for an open proceeding may be particularly strong with respect to suppression hearings," the Court maintained. *Id.* at

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[15] *Press-Enterprise II* is distinguishable not only because there were no jurors, but also because it was decided under the First Amendment, and the Court emphasized that, "[b]ecause of its extensive scope, the preliminary hearing is often the final and most important step in the criminal proceeding" and in many cases provides the only chance for public observation. 478 U.S. at 7, 12.

47. A jury-selection proceeding will not necessarily have those characteristics.[16]

It is also difficult to see how the exclusion of spectators from jury selection could be treated as presumptively altering the verdict without a significant assumption: that either the actual jury or a differently-constituted jury would have decided the case based on factors other than the evidence. But that would be the opposite of what this Court says to presume. *See Strickland*, 466 U.S. at 694-95. *Strickland* instructs a court assessing prejudice to "presume . . . that the judge or jury acted according to law," and "proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision," "even if a lawless decision cannot be reviewed." *Id.* (making exception for where defendant also claims evidentiary insufficiency). *Strickland* also requires the defendant to establish "a reasonable probability that, absent the errors, the factfinder would have had a *reasonable* doubt respecting guilt." *Id.* at 695 (emphasis added). "A 'reasonable doubt' has often been described as one 'based on reason which arises from the evidence or lack of evidence.'" *Jackson v. Virginia*, 443 U.S. 307, 317 n.9 (1979) (quoting *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972)). It is

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[16] *Cf. Fulminante*, 499 U.S. at 307 (observing that Court applied harmless-error analysis in *Rushen v. Spain*, 464 U.S. 114 (1983), which involved allegations that defendant's right to be present at trial was violated by trial judge's unrecorded, *ex parte* conversation with juror concerning her familiarity with event mentioned at trial, which she unwittingly failed to disclose during voir dire); *accord Rose*, 478 U.S. at 576 (similar).

not a "fanciful" one. *Victor v. Nebraska*, 511 U.S. 1, 7-23 (1994).[17]

3. The failure to object to a *Presley* error may very rarely lead to *Strickland* prejudice, but any such prejudice would not be "impossible" to show.

In contrast to those circumstances in which prejudice for ineffectiveness has been presumed, the failure to object to a *Presley* error is unlikely to affect the outcome of the case or form the basis for a valid *Strickland* claim. But in the rare case where counsel's error does cause such prejudice, it would not, contrary to Petitioner's contentions, be "impossible" to show.

For *Strickland* prejudice to arise from counsel's failure to object, the failure to object must have affected the proceedings. Thus, no prejudice arises where an objection would only have caused a conscientious judge to find the closure justified under the *Waller* factors. For those closures not justified under *Waller*, the defendant must show that, "absent" the erroneous exclusion of spectators during jury selection, "the factfinder would have had a *reasonable* doubt respecting guilt," *Strickland*, 466 U.S. at 695 (emphasis added), meaning a doubt "'based on reason

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[17] Even as *Presley* focused on a defendant's Sixth Amendment right to a public trial, its holding was based in part on concerns for the First Amendment rights of spectators. 558 U.S. at 214-15 ("The public has a right to be present whether or not any party has asserted the right."). But when a defendant's claim is based not directly on the right to a public trial, but rather on the right to effective counsel, the First Amendment interests of third parties are more attenuated.

which arises from the evidence or lack of evidence,'" *Jackson*, 443 U.S. at 317 n.9 (quoting *Johnson*, 406 U.S. at 360). So, the mere possibility that a differently constituted jury might have rendered a different verdict based on the same evidence does not qualify. And such prejudice is less likely in cases where the verdict had "overwhelming record support." *Strickland*, 466 U.S. at 695-96.

However, there may occasionally be unusual or egregious circumstances that present a sound basis for believing that prejudice arose from a courtroom closure during jury selection, perhaps because of a particular trial participant's behavior in the closed courtroom or a connection between an excluded spectator and the proceedings. The defendant may couple an explanation of how those circumstances may have affected the jury's consideration of the case with arguments that the "verdict [was] only weakly supported by the record," and thus "more likely to have been affected by [the] error[]." *Id.* at 695-96. In such a case, *Strickland*'s reasonable-probability standard could be met.

4. Had Petitioner attempted to show actual prejudice, he probably would have failed, because it was highly unlikely to have arisen.

In Petitioner's case, two factors did make it difficult for him to show prejudice. First, he did not even attempt to make such a showing. And second, it is highly unlikely that any prejudice arose.

Although Petitioner's public-trial claim was forfeited, he had a second chance to press the issue through an ineffectiveness claim. He secured an evidentiary hearing on the claim, and the opportunity to have it evaluated under a Massachusetts standard more generous than that provided under the federal constitution as part of the state plenary appellate review process. *See* Statement, *supra*; Pet. App. 2a, 8a, 30a-31a, 38a, 41a, 43a-54a; J.A. 88. Yet Petitioner made no attempt to show prejudice. Pet. App. 40a-41a, 64a. Instead, he relied on an argument that he makes here—that it would be impossible for him to make such a showing.

But even if he had attempted such a showing, he would have had to confront the reality that any prejudice was highly improbable. During jury selection at his trial, the courtroom was not free from the watchful eye of the public; rather, a large group of prospective jurors was there to observe. Pet. App. 38a-39a, 43a-47a, 50a, 53a. *Cf. Press-Enterprise II*, 478 U.S. at 12-13. So, it is not true that "the jury that would ultimately convict [Petitioner] was selected in secret." Br. 1.

Moreover, the overcrowding would have lessened the likelihood that any participants would have noticed, or been affected by, the admission or exclusion of a few more people. Indeed, "the defendant was unaware that the courtroom was closed," Pet. App. 50a, 62a, and "[u]nderstandably, the court's attention was focused on conducting an efficient, fair and uneventful empanelment without undue inconvenience to prospective jurors," Pet. App. 46a.

Notably, Petitioner "does not claim that the courtroom's closure during voir dire affected the voir dire process and tainted the ultimate jury chosen." *Vaughn*, 491 Mich. at 674, 821 N.W.2d at 308. Nor does the transcript suggest that the exclusion of spectators led to any "breakdown in the adversary process" or lack of "fundamental fairness" during the proceeding. *Strickland*, 466 U.S. at 687, 696, 700. For example, in addition to asking a set of questions to the venire as a whole, the judge spoke with prospective jurors individually about their attitudes toward police, racial bias, and whether the nature of the case would impact their ability to be fair and impartial. Tr. 04/07/06; 04/10/06. He also appropriately struck jurors who had substantial time commitments, admitted to bias, had some familiarity with individuals involved in the case, or otherwise raised doubts about their ability to serve properly. *Id.* And the defense exercised all or nearly all of its peremptory strikes. Tr. 04/10/06, at II:217-18.

Given all these factors, it is not realistic to surmise "that jurors might have been more forthcoming about biases and past experiences if they had faced" the added spectators, or that "[the defendant] and the Government might have picked a more impartial jury or asked different questions" with additional citizens watching, *Owens*, 483 F.3d at 65.

Petitioner contends that we can never really know how the admission of spectators would have affected jurors or other participants, or what they would have done otherwise. Br. 6, 19. But a degree of uncertainty inheres in virtually any *Strickland* prejudice inquiry; uncertainty is inevitable in applying a standard that searches for a "reasonable

probability" about what "would have" happened "absent [certain] errors." *Strickland*, 466 U.S. at 694-95; *cf. Sears v. Upton*, 561 U.S. 945, 955-56 (2010) (observing as to ineffectiveness in sentencing that *Strickland* standard "will necessarily require a court to 'speculate' as to the effect of the new evidence").

There are still other reasons why there is no reasonable probability that the verdict was affected by the failure to object to the spectators' exclusion from jury selection. No witnesses or evidence was offered during that time. Tr. 04/07/06; 04/10/06. *Contrast Waller*, 467 U.S. at 46-47 & n.5. The "totality of the evidence" that ultimately was introduced provided strong "record support" for the verdict. *Strickland*, 466 U.S. at 695-96. It included Petitioner's confession, as well as DNA, ballistics, and eyewitness evidence. Pet. App. 1a-4a, 7a, 9a, 12a, 16a, 23a, 26a; J.A. 89-90, 94. And there has been no suggestion that spectators were excluded from the courtroom when that evidence was offered, or at any other point after jury selection. Any benefits from the presence of the public would have been realized during that time.[18]

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[18] Of course, all this assumes that defense counsel's conduct was even deficient in the *Strickland* sense. *Compare* Pet. App. 46a n.1, 51a n.7, 63a-64a (reflecting motion judge's observation that "the custom and practice of closing the courtroom to the public during empanelment, especially in murder cases, was prevalent" at the time, but finding that "counsel's failure to object . . . stemming from a misunderstanding of the law . . . was not objectively reasonable"), *with Strickland*, 466 U.S. at 688-90 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."), *and Harrington*, 562 U.S. at 110 ("*Strickland* . . . calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.").

In sum, even with the spectators' exclusion, the proceeding at issue was not shielded from the public; to the contrary, the courtroom was packed with the jury venire. Given that fact, the weight of the evidence, and the other factors described above, it is highly unlikely that closing the courtroom during jury selection affected the judgment. Even if defense counsel erred in acquiescing to this closure, Petitioner was not deprived of the loyal and effective advocate that the Sixth Amendment envisions. His trial was not unfair and did not produce unreliable or unjust results. Reversal here would be fundamentally at odds with the right to the assistance of counsel as this Court has described it until now and would hand Petitioner a windfall. Contrary to his suggestions, such an outcome would not promote, but would instead undermine, public confidence in the adjudicative process.

CONCLUSION

The judgment of the Massachusetts Supreme Judicial Court should be affirmed.

Respectfully submitted,

MAURA HEALEY
Attorney General of Massachusetts
ELIZABETH N. DEWAR
State Solicitor
RANDALL E. RAVITZ*
THOMAS E. BOCIAN
Assistant Attorneys General
JOHN P. ZANINI
Special Assistant Attorney General
One Ashburton Place
Boston, MA 02108
(617) 963-2852
Randall.Ravitz@State.MA.US
**Counsel of Record*

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